Supreme Court, U.S.
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No

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CALIFORNIA FEDERAL BANK, FSB

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a *Winstar*-related case, an exchange of documents between thrift regulators and a thrift institution that simply embodies a request for and grant of regulatory approval of a proposed acquisition by the thrift constitutes a contract between the United States and the thrift.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, respectfully conditionally cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case. If the Court grants the petition in *California Federal Bank, FSB* v. *United States*, No. 01-592, it should grant this cross-petition. If the Court denies that petition, it also should deny this cross-petition.

OPINIONS BELOW

The opinion of the court of appeals (01-592 Pet. App. 1a-15a) is reported at 245 F.3d 1342. The opinion of the Court of Federal Claims regarding liability (01-592 Pet. App. 48a-101a) is reported at 39 Fed. Cl. 753, and the opinion of the Court of Federal Claims regarding

remedies (01-592 Pet. App. 17a-47a) is reported at 43 Fed. Cl. 445.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2001. A petition for rehearing was denied on July 10, 2001 (01-592 Pet. App. 16a). The petition for a writ of certiorari in *California Federal Bank, FSB* v. *United States*, No. 01-592, was placed on this Court's docket on October 9, 2001. This conditional cross-petition is filed pursuant to Rule 12.5 of the Rules of the Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of 12 U.S.C. 1464(a) (1982), 12 U.S.C. 1730(q)(1) and (6) (1982), and 12 U.S.C. 1730a(e)(1) (1982) are set forth in the Appendix to this petition.

STATEMENT

This case is one of more than 100 pending *Winstar*-related cases (see *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996)) currently pending in the Court of Federal Claims and the Federal Circuit. This cross-petition concerns the court of appeals' affirmance of the trial court's liability ruling on summary judgment that the United States and California Federal Bank (CalFed) had a contractual relationship with respect to two particular transactions, such that a breach of contract could arise from a change in the regulatory scheme brought about by the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. The

petition in No. 01-592, filed by CalFed, concerns several of the court of appeals' rulings on remedial issues.

1. From the 1930's until after the events at issue in this case, federal regulation of the thrift industry was the primary responsibility of the Federal Home Loan Bank Board (FHLBB or Bank Board). See generally 12 U.S.C. 1464 (1982). "Congress delegated power to the Board expressly for the purpose of creating and regulating federal savings and loans so as to ensure that they would remain financially sound institutions able to supply financing for home construction and purchase." *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 168 (1982). The Federal Savings and Loan Insurance Corporation (FSLIC) administered a fund that insured deposits held by thrift institutions. 12 U.S.C. 1726 (1982). FSLIC was a separate entity under the direction of the FHLBB. See 12 U.S.C. 1725(a) (1982).

At the times pertinent to this case, Congress had by statute prohibited any insured thrift institution from acquiring or merging with another insured institution without regulatory approval. See 12 U.S.C. 1730(q)(1) (1982) ("No person * * * shall acquire control of any insured institution * * * unless [FSLIC] has been given sixty days' prior written notice * * * and within that time period [FSLIC] has not issued a notice disapproving the proposed acquisition."); 12 U.S.C. 1730a(e)(1)(A)(i) (1982) ("It shall be unlawful for * * * any savings and loan holding company * * * to acquire, except with the prior written approval of [FSLIC], the control of an insured institution or a savings and loan holding company."). A notice to FSLIC of a proposed merger of a thrift had to include "[t]he terms and conditions of the proposed acquisition." 12 U.S.C. 1730(q)(6)(C) (1982); see also 12 C.F.R. 563.22

(1982) (no thrift may increase its insurable accounts as part of any merger or consolidation without FSLIC's approval); 12 C.F.R. 571.5(b)(2) (similar information for savings and loan holding company). At all relevant times, the acquiring institution had to submit an application for approval of a merger, acquisition, consolidation or change in control of a thrift. See, *e.g.*, 12 C.F.R. 546.2(c), 563.22(a), 584.4(f) (1982). The regulations prescribed that in ordinary merger situations, "[t]he proposed treatment of goodwill in connection with the merger must be fully described in the application." 12 C.F.R. 571.5(e) (1982), and "[p]otential merger applicants are encouraged to review proposed mergers with the Supervisory Agent prior to proceeding with the formal application process," 12 C.F.R. 571.5(a) (1982).

2. CalFed made three sets of acquisitions in the 1980's. We do not challenge the court of appeals' ruling that the United States is liable for breach of contract with respect to one of CalFed's acquisitions, which involved four thrifts known collectively as "Southeast." That acquisition involved more than mere regulatory approval. We do, however, dispute the court of appeals' rulings that the United States entered into contracts with CalFed when the FHLBB and FSLIC took regulatory actions concerning CalFed's other two acquisitions—of Brentwood Savings and Loan Association and the Family Savings and Loan Association—and that the "contracts" could in turn give rise to liability for breach.

a. In February 1982, CalFed acquired four thrift institutions, known collectively as Southeast. 01-592 Pet. App. 18a & n.1. The acquisition resulted in an assumption by CalFed of $305 million in net liabilities. *Id.* at 2a, 18a. On February 3, 1982, the Bank Board passed a resolution approving the transactions and specifically reciting that "[t]he mergers are conditioned

upon the execution of an Assistance Agreement between [CalFed] and the FSLIC." 2 C.A. App. A5000205. On February 5, 1982, CalFed accordingly entered into an assistance agreement with FSLIC, under which it received a $9 million capital credit from FSLIC. The FHLBB issued a forbearance letter to CalFed permitting it to record the ex ess liabilities as supervisory goodwill and amortize that amount over 35 to 40 years. See *id.* at A5000222-A5000230.

The agreement between FSLIC and CalFed was a contract. It was entitled "Assistance Agreement," and it stated in its first sentence that it "is entered into between the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, an independent agency of the United States Government ("FSLIC"), and CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION." 2 C.A. App. A5000223. After a series of recitals, the agreement stated that "[i]n consideration of the mutual promises herein contained, the parties enter into the following agreement." *Id.* at A5000224. The agreement included an integration clause similar to the clauses in the contracts at issue in *Winstar*, see 518 U.S. at 862, 864, 867 (plurality opinion), that incorporated the FHLBB forbearance letters that were issued contemporaneously with the assistance agreement. 2 C.A. App. A5000228.

The government does not dispute that the Southeast assistance agreement was a contract and, for purposes of this cross-petition, we do not dispute that the United States is liable for breach of that contract after enactment of FIRREA, which prohibited CalFed from using the supervisory goodwill to satisfy federal capital requirements for the entire 35-40 year period. CalFed's acquisition of the Southeast thrifts is therefore not at issue in this cross-petition. That transaction does, how-

ever, illustrate the steps necessary for a contract with the United States, steps which were not taken with respect to the transactions that are at issue in this cross-petition.

b. In October 1982, CalFed acquired the parent company of Brentwood Savings, a federally insured thrift institution in Los Angeles. There was no assistance agreement between FSLIC and CalFed in which FSLIC furnished guarantees or other financial assistance to CalFed in connection with its acquisition of Brentwood. CalFed negotiated a merger agreement with the owner of Brentwood. 2 C.A. App. A5000302-A5000339. On July 12, 1982, Brentwood submitted to the Bank Board a document entitled "Application of [CalFed] For Merger With Brentwood Savings" and asked that certain forbearances be granted in connection with the merger. *Id.* at A5000374. The application was submitted pursuant to 12 U.S.C. 1730a(e) (1982), which required FSLIC approval of an acquisition of an insured thrift by a savings and loan holding company. See 3 C.A. App. A5002319. In a letter dated July 27, 1982, CalFed set forth "the reasons for the supervisory forbearances requested" in connection with the proposed merger. 2 C.A. App. A5000475. In a letter dated September 2, 1982, CalFed again requested FHLBB approval for the transaction and asked to be able to record the net liabilities it assumed in the transaction (which amounted to $314 million) as supervisory goodwill to be amortized over 35 years. 01-592 Pet. App. 3a; see 3 C.A. App. A5002325.

The FHLBB, as the operating head of FSLIC, approved the transaction in a resolution dated September 30, 1982. 3 C.A. App. A5002319-A5002321. The resolution begins with several "whereas" clauses, and continues that "IT IS HEREBY RESOLVED, that the

subject acquisition of * * * Brentwood is hereby approved * * *, provided that the following conditions are complied with." *Id.* at A5002319. Among the conditions was that CalFed "shall furnish analyses * * * satisfactory to" FHLBB's agents

> which (a) specifically describe, as of the effective date, any intangible assets, including goodwill, or discounts and premiums arising from the merger to be recorded on the books of Applicant, and (b) substantiate the reasonableness of amounts attributed to intangible assets, including goodwill, and the discounts and premiums and the related amortization periods and methods.

Id. at A5002321.

In a letter to CalFed dated October 1, 1982, the FHLBB, in its own capacity and as operating head of FSLIC, stated that "[i]n its approval of the merger [of CalFed and Brentwood], the Bank Board determined to exercise supervisory forbearance, to grant waivers and to confirm the manner of application of certain regulatory requirements of the Bank Board and the FSLIC applicable to the Resulting Association." 3 C.A. App. A5002322. The letter went on to specify "the nature and extent of the confirmations, forbearance and waivers granted in recognition of the circumstances of the merger." *Ibid.* Among the forbearances was a statement that CalFed

> may amortize any goodwill created under the purchase method of accounting using the straight line method over the estimated useful life of 35 years * * *. Notwithstanding any change in generally accepted accounting principles or interpretation thereof, [CalFed] may report for any and all reports to the Federal Home Loan Bank Board its financial

> condition and operations in accordance with the accounting method described in the preceding sentences.

Id. at A5002323-A5002324. See generally 01-592 Pet. App. 3a.

c. In January 1983, CalFed acquired Family Savings and Loan Association, which had operated in Reno, Nevada. That transaction was preceded by negotiation of an acquisition agreement between CalFed and Family. 2 C.A. App. A5000490-A5000521. CalFed then applied for FHLBB approval of the merger. *Id.* at A5000531. CalFed's application included a copy of the acquisition agreement between CalFed and Family, which recited, *inter alia*, that any goodwill created by the merger (which in fact ultimately amounted to $17.74 million, see 01-592 Pet. App. 3a) would be amortized using the straight line method over a 40-year period. *Ibid.*; 2 C.A. App. A5000503. CalFed's application to the Bank Board stated that CalFed "requests that the FHLBB specifically approve the amortization of any goodwill created under the purchase method of accounting using the straight line method over the estimated useful life of 40 years." *Id.* at A5000536. CalFed also submitted a letter to the Bank Board requesting, *inter alia*, the same sort of forbearance it had requested in connection with its acquisition of Brentwood. *Id.* at A5000484-A5000488.

As with CalFed's acquisition of Brentwood, there was no assistance agreement between FSLIC and CalFed in connection with CalFed's acquisition of Family. The FHLBB approved the transaction in two resolutions dated January 5, 1983. 3 C.A. App. A5002549-A5002550, A5002552-A5002558. The resolutions were in form quite similar to the resolutions in the Brent-

wood transaction. The first resolution granted CalFed a federal charter for the new Nevada institution that would result from the merger. *Id.* at A5002549. The second resolution approved CalFed's acquisition of control of Family, pursuant to 12 U.S.C. 1730a(e) (1982). *Id.* at A5002552. The FHLBB also sent a forbearance letter to CalFed in connection with the Family transaction on January 5, 1983, that was in relevant respects identical to the October 1, 1982 letter it sent in connection with the Brentwood transaction. *Id.* at A5002559.[1]

3. In 1989, Congress enacted FIRREA, which overhauled the entire structure of federal thrift regulation. Of particular relevance here, it obligated thrifts to comply with strict new capital standards, which phased out over a five-year period the ability of thrifts to count supervisory goodwill as capital for federal regulatory purposes. See generally *Winstar Corp.*, 518 U.S. at 856-857 (plurality opinion).

4. CalFed brought suit against the government in the Court of Federal Claims, asserting that FIRREA's prohibition on the use of supervisory goodwill to satisfy the new capital requirements breached contracts it allegedly entered into with the government in connection with its acquisitions of Southeast, Brentwood, and Family. After this Court's decision in *Winstar*, Chief Judge Smith of the Court of Federal Claims adopted a

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[1] The court of appeals erroneously stated that there was a forbearance letter dated November 26, 1982, in addition to the forbearance letter dated January 5, 1983. 01-592 Pet. App. 3a. There was no such letter prior to January 5, 1983, since the Bank Board would not issue a forbearance letter prior to having approved the transaction. It appears that the court of appeals was referring to an internal Bank Board memorandum dated November 26, 1982, which analyzed the proposed acquisition, including the forbearances sought by CalFed. See 3 C.A. App. A5002612-5002616.

plan to resolve common issues in the more than 100 *Winstar*-related cases then pending in that court. See 01-592 Pet. App. 2a. The plan ultimately included a process by which the court first addressed summary judgment motions on liability in this case and three other representative cases. The four cases were selected because they "raise issues that are potentially relevant in a large number of the pending Winstar-related cases," *id.* at 52a, and "would ventilate the broadest cross-section of the contract defenses raised by defendant," *id.* at 56a.

In this case, the government argued in opposition to CalFed's summary judgment motion with respect to its acquisitions of Brentwood and Family that, *inter alia*, "no 'Winstar-like contractual obligations' were imposed on the government." 01-592 Pet. App. 88a. The government reasoned that the relevant documents consisted only of requests by a regulated entity for the necessary regulatory approval of its acquisitions of another entity, followed by grants by the government authorities of that approval, subject to certain conditions. Those regulatory approvals, the government argued, do not constitute a contractual undertaking by the government. The Court of Federal Claims, however, framed the issue as follows:

> Absence of a written Assistance Agreement *per se* eliminates any possibility that an acquiring thrift and the government executed a capital contract, because without such an assistance agreement, the FHLBB/FSLIC resolutions, letters and other documents and evidence cannot be given contractual effect.

Id. at 86a.

Having framed the claim as stated above, the trial court rejected it. It agreed with CalFed's contention that "[t]he common operative fact in all Winstar-type transactions is that 'the Government sought to induce the acquisition of a troubled thrift through promises regarding supervisory goodwill and capital compliance and was successful.'" 01-592 Pet. App. 86a. The court stated that "[i]f the factual records of individual cases show intent to contract with the government for specified treatment of goodwill, and documents such as correspondence, memoranda, and Bank Board resolutions confirm that intent, the absence of an [assistance agreement] or [supervisory action agreement] should be irrelevant to the finding that a contract existed." *Id.* at 87a. The court then concluded "that contracts existed between CalFed and the government" with respect to CalFed's acquisitions of Brentwood and Family and granted summary judgment on liability to CalFed. *Id.* at 89a. The court explained, moreover, that it found an express contract between CalFed and the government in this case. *Id.* at 88a & n.21. The court did not, however, specify which of the documents reflecting regulatory approval by the FHLBB and FSLIC constituted that express contract. Nor did it identify the basis on which it concluded, on a motion for summary judgment, that there was an intent to contract in this case. Rather, the court stated simply that "[m]utuality of intent, even in the context of written contracts, may be established by several contractual instruments as opposed to one superseding document," and that "[c]ontracts are frequently found to exist despite the absence of an integrating document." *Id.* at 89a.

5. The case was then transferred to Judge Hodges for resolution of damages issues. Judge Hodges held

that CalFed had failed to prove many elements of its claimed billions of dollars in damages, but he ultimately awarded CalFed approximately $23 million in compensation for costs it incurred in replacing the supervisory goodwill whose continued use to satisfy regulatory capital requirements was eliminated by FIRREA. 01-592 Pet. App. 17a-47a. The damages issues in this case are the subject of the petition in No. 01-592. This cross-petition, however, concerns the liability issues that had already been decided on summary judgment by Chief Judge Smith.

6. The government appealed the liability ruling and CalFed appealed the damages ruling to the Federal Circuit. The court of appeals affirmed the trial court's determination on summary judgment that the United States had entered into a contract with CalFed. 01-592 Pet. App. 5a-9a. Initially, the court agreed with the trial court that "[t]he fact that Cal Fed did not enter into an assistance agreement by which it would receive direct cash assistance from the FSLIC in the Brentwood and Family transactions * * * is not dispositive of the issue of contract formation between the government and Cal Fed." *Id.* at 5a-6a. The court stated that "the government bargained with Cal Fed to assume the net liabilities of the acquired thrifts in exchange for favorable regulatory consideration allowing goodwill to be counted as an asset." *Id.* at 6a. The court also concluded that "both the government and Cal Fed provided consideration for the agreements," which included the government's commitments regarding CalFed's use of supervisory goodwill. *Id.* at 6a-7a. The court concluded, "[b]ased on all of the contemporaneous documents in each of the * * * transactions," *id.* at 6a, that "[j]ust as in [this Court's decision in *Winstar*], all of the necessary elements of contract formation are

present here, and the parties are bound by the terms of that contract." *Id.* at 7a. Like the trial court, however, the court did not identify any evidence that supported the conclusion that CalFed and the United States intended to form a contract, rather than to seek and grant, respectively, the necessary regulatory approval for CalFed's acquisitions of Brentwood and Family.

The court also held that "the FHLBB and the FSLIC have the authority to enter into contracts like these." 01-592 Pet. App. 7a. In support of that proposition, the court cited three statutory provisions, all of which refer only to FSLIC, not the FHLBB. First, the court stated that "[s]ince its inception, the FSLIC has had the authority under 12 U.S.C. § 1725(c)(3) to make contracts." *Ibid.* Section 1725(c)(3), which was repealed by FIRREA, see 103 Stat. 363, provided that FSLIC "shall have the power * * * [t]o make contracts." The court also noted that "both the FSLIC and its supervisory agency, the FHLBB, have had 'the authority both to extend assistance to acquirers of insolvent FSLIC-insured thrifts, 12 U.S.C. § 1729(f)(2)(A) (repealed), and to set minimum capital limits on a case-by-case basis, 12 U.S.C. § 1730(t)(2) (repealed).'" 01-592 Pet. App. 7a. Section 1729(f)(2)(A)(iii) provided that FSLIC could "guarantee" an acquiring institution "against loss by reason of" the acquirer's "merging or consolidation with or assuming the liabilities and purchasing the assets of" a failing institution. Section 1730(t)(2), which permits FSLIC to set minimum capital limits, was enacted on August 10, 1987, almost five years after the transactions in question in this case. See Thrift Industry Recovery Act, Pub. L. No. 100-86, § 406(b), 101 Stat. 615.

With respect to damages issues, the court of appeals affirmed the district court's rulings, with one exception.

The court vacated the district court's ruling that CalFed's proof of lost profits damages was insufficient as a matter of law, holding that the evidence was sufficient "to create a genuine issue of material fact as to the existence and quantum of lost profits." 01-592 Pet. App. 11a. The court therefore remanded the case to the district court for further proceedings with respect to that issue. *Id.* at 15a.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

The Federal Circuit remanded this case to the trial court for further proceedings on damages, and it therefore comes to this Court in an interlocutory posture. This Court should avoid piecemeal review of the various issues in this case and deny the petition in No. 01-592 for the reasons we will detail in a brief in opposition to be filed with the Court. It is possible that, upon the conclusion of the lower court proceedings, some of the issues upon which the parties now seek review may take on lesser significance or become moot. Moreover, by awaiting the conclusion of the lower court proceedings, the Court could consider any issues on which review might then be sought in their proper perspective as part of a broader and final resolution of the case.

However, if the Court grants the petition in No. 01-592, it should also grant this cross-petition. The damages issues raised in CalFed's petition are premised on the proposition that the government entered into a contractual relationship with CalFed, such that a subsequent breach should lead to an award of various forms of damages. This cross-petition challenges that fundamental premise. The actions by the FHLBB and FSLIC at issue in this cross-petition involved no *con-*

tractual commitments by the government that could form the basis for any claim for contract damages, but instead involved instances in which CalFed merely applied for and obtained the necessary *regulatory* approval to engage in regulated transactions. If the Court decides to address the damages issues raised by petitioner, it should not do so without considering the antecedent liability issue raised herein. Moreover, this issue has significance for many other *Winstar*-related cases pending in the courts below. The trial court selected this case for expedited resolution precisely because it involved liability issues that are common to many of the pending *Winstar*-related cases.

More generally, the court of appeals' decision constitutes an extraordinary extension of contract law principles to federal regulatory action. In the cases before this Court in *Winstar*, the existence of contracts between the thrifts and regulators was undisputed, based on the existence of assistance agreements between FSLIC and the acquiring thrift. The Court construed those contracts to contain a guarantee by FSLIC against loss by the acquiring thrift resulting from a change in the law governing the use of supervisory goodwill to satisfy federal capital requirements. The record in this case, however, consisted of materials documenting the regulatory approval of private transactions, accompanied by statements of regulatory forbearance. Those documents do not constitute a contract at all, much less one guaranteeing against potential losses experienced by CalFed. By affirming the Court of Federal Claims' grant of summary judgment to CalFed on the question of liability, the court of appeals necessarily held, as a matter of law, that the compilation of documents manifesting regulatory approval constitutes a contract with CalFed and that the

United States is now liable in damages. The courts below effectively converted a regulatory record into a binding contract. That conclusion flies in the face of settled principles of administrative law, under which the mere exercise of governmental regulatory authority does not create a contractual relationship between the government and regulated entities.

1. "Banking is one of the longest regulated and most closely supervised of public callings." *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1947). Savings and loan associations were "created, insured and aided by the Federal Government." *Ibid.* At the time CalFed acquired Brentwood and Family, no insured savings and loan association could conclude a merger without the regulatory approval of the FSLIC. 12 U.S.C. 1730(q), 1730a(e) (1982).

Each of the merger and acquisition transactions at issue on this cross-petition involved CalFed's seeking —and the Bank Board's granting—the necessary regulatory approval. With respect to each of the transactions, CalFed submitted an application seeking the Board's approval. 2 C.A. App. A5000374-A5000455 (Brentwood), A5000531-A5000743 (Family). As the then-current regulations required, see 12 C.F.R. 571.5(b)(2), 571.5(e) (1982), CalFed included in each application a description of the accounting methods it anticipated it would use to account for the merger, and it included a list of the regulatory forbearances that it desired the Bank Board to grant. 2 C.A. App. A5000374 (Brentwood), A5000536 (Family). CalFed sent the Bank Board two letters in connection with the Brentwood acquisition and one letter in connection with the Family acquisition concerning the requested forbearances. *Id.* at A5000475-A5000480 (Brentwood); 3 C.A. App. A5002325 (Brentwood); 2 C.A. App. A5000484-

A5000488 (Family). The Bank Board adopted resolutions approving the merger or acquisition, *id.* at A5000461-A5000463 (Brentwood merger), A5000179-A5000180, A5000182-A5000188 (Family acquisition), and issued letters setting forth the forbearances CalFed sought, *id.* at A5000465-A5000467 (Brentwood); 3 C.A. App. A5001306-A5001308 (Family).

All of the documents in both of the transactions manifest a straightforward exercise of federal regulatory authority, in which the regulated entity explains how a transaction it seeks will serve the public interest and satisfy specific statutory and regulatory standards and the federal regulator decides to approve the transaction on that basis. There is no document with respect to either of the transactions that remotely suggests that a *contractual* commitment by the government was at issue. The Bank Board resolutions, for example, recited simply that the mergers by petitioner were "approved." See, *e.g.*, 3 C.A. App. A5002321 (Brentwood), A5002549, A5002553 (Family). Similarly, the forbearance letters stated that the Bank Board had "determined to exercise supervisory forbearance" and set forth "the nature and extent" of the forbearances granted. See *id.* at A5002322 (Brentwood), A5002559 (Family). All of those documents, by their terms, are framed in terms of determinations to exercise (or, in the case of forbearances, determinations not to exercise) regulatory authority by a duly authorized federal regulatory authority. None of the documents suggests an exchange of contractual commitments.

Certainly, the fact that the regulatory approvals here were proceeded by an application filed by CalFed and one or two subsequent letters attempting to secure the regulators' approval does not suggest that the parties engaged in contractual "negotiations" or that the re-

sulting documents—contrary to their terms—embodied contractual commitments. Such "negotiations" between regulator and regulated entity are an accepted part of ordinary agency practice. Cf. *USA Group Loan Servs., Inc.* v. *Riley*, 82 F.3d 708, 714-715 (7th Cir. 1996) (discussing Negotiated Rulemaking Act of 1990, 5 U.S.C. 561 *et seq.*). Indeed, there was no documentary evidence that the federal regulators played any role whatever in the only genuinely contractual negotiations that did occur—those between CalFed and the owners of the institutions it acquired.[2]

Nor was there anything "contractual" about the Bank Board's decision to forbear from enforcing particular regulatory requirements. To the contrary, such forbearances are an exercise of the enforcement discretion vested in federal regulatory agencies. Such forbearance letters are employed to let regulated entities know that the regulators have no present intention to take action against them on the specified grounds. The legitimate grounds for declining to enforce regulatory requirements are so varied and the discretion to weigh those grounds is so central to an agency's proper discharge of its regulatory responsibilities that agency decisions to forbear from enforcing regulatory requirements are presumptively beyond the scope of judicial

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[2] The record before the trial court included a single declaration by a CalFed attorney asserting that the federal regulators had induced CalFed to acquire Family. See 01-592 Pet. App. 77a (discussing affidavit of William Callender in connection with another issue). That evidence was contradicted by the government's evidence that CalFed was independently interested in acquiring Family. See 3 C.A. App. A5001500 (internal CalFed document stating that Family was showing "good progress"), A5000861-A5000863 (company's interest in "extension of operations into new market areas").

review. See, *e.g.*, *Heckler* v. *Chaney*, 470 U.S. 821 (1985). A fortiori, an agency exercise of enforcement discretion does not suggest that the agency has entered into a binding contractual undertaking.

2. The court of appeals' attempt to support its conclusion that a contract was formed by reference to this Court's decision in *Winstar* is without merit. A comparison between *Winstar* and this case vividly illustrates the differences between the undoubted contracts that were before the Court in *Winstar* and the absence of a contract here. The court of appeals stated that this case is like *Winstar* because, "[j]ust as in *Winstar* * * *, all of the necessary elements of contract formation are present here, and the parties are bound by the terms of that contract." 01-592 Pet. App. 7a. In each of the transactions before the Court in *Winstar*, however, FSLIC and a thrift institution had formally signed a document entitled "Assistance Agreement" or "Supervisory Action Agreement." See 518 U.S. at 861-868. Those documents thus identified themselves as "agreements," and they included standard contractual clauses, such as integration clauses. See *ibid.*

The issue before the Court in *Winstar* was not whether contracts had been formed between FSLIC and the thrifts, but whether the contracts that undoubtedly existed contained terms regarding the treatment of supervisory goodwill that gave rise to liability on the part of the United States when Congress passed a law that affected that treatment. Far from including all of the necessary elements of contract formation present in *Winstar*, the Brentwood and Family acquisitions do not feature the most elemental aspect of contract formation —evidence of a mutual intent to contract. See *Lewis* v. *United States*, 70 F.3d 597, 600 (Fed. Cir. 1995) ("Like an express contract, an implied-in-fact contract re-

quires '(1) mutuality of intent to contract; (2) consideration; and, (3) lack of ambiguity in offer and acceptance'" and (4) "actual authority to bind the government.").

The Court did address questions of contract interpretation in *Winstar*, ruling that the contracts there included commitments regarding the treatment of supervisory goodwill, as stated in Bank Board documents. But that conclusion was not based on the implausible assumption that the Bank Board documents themselves, contrary to their express terms, were inherently contractual in nature. Rather, the plurality concluded that the contracts that did exist between FSLIC and the acquiring thrifts—the assistance agreements—in turn incorporated and "characterize[d] the Board's resolutions and letters not as statements of background rules, but as part of the 'agreements and understandings' between the parties." 518 U.S. at 863 (Glendale contract); see also *id.* at 862 (noting that the terms of the Glendale contract were "similar in all relevant respects to the analogous provisions in the" other two transactions before the Court in *Winstar*). That reasoning does not suggest that Bank Board regulatory approvals were contractual in nature; it suggests to the contrary that a separate contract between FSLIC and the acquiring thrifts was necessary to convert regulatory documents into contractual undertakings which could give rise to liability. No such contract exists in this case.

That conclusion is buttressed by the *Winstar* plurality's conclusions regarding the terms of the promise made by the government in that case. The plurality construed the promise not as one that "purported to bind Congress to ossify the law in conformity to the contracts," 518 U.S. at 871; see also *id.* at 868-869, 881, 888, but as a contractual undertaking on the part of the

United States to "assume[] the risk that subsequent changes in the law" would occur and to guarantee against losses the acquiring thrifts might incur as a result of any such change, *id.* at 871; see also *id.* at 868-869, 881-883, 888-890, 907-908, 909-910; *id.* at 911, 918 (Breyer, J., concurring); cf. *id.* at 919-920, 923 (Scalia, J., concurring in the judgment). Indeed, the plurality twice cited 12 U.S.C. 1729(f)(2)(A)(iii) (1982), which granted FSLIC authority to "guarantee" an acquiring thrift against loss resulting from its acquisition of a failing insured thrift. See 518 U.S. at 883, 890. At the time of the transactions in *Winstar* and this case, however, 12 U.S.C. 1729(f) provided that no such guarantee or other financial assistance could be provided by FSLIC in connection with such an acquisition in excess of the amount FSLIC determined to be reasonably necessary to save the cost of liquidating the failing insured institution. See 12 U.S.C. 1729(f)(4) (1982). That requirement ensured that FSLIC would specifically consider the appropriateness of entering into a contractual commitment, in addition to giving regulatory approval, to facilitate the acquisition of a failing thrift.

In *Winstar*, the FHLBB (acting as the head of the FSLIC) expressly made that determination in approving the assistance agreement between FSLIC and the acquiring thrift in connection with each of the acquisitions at issue. See 95-865 J.A. 81, 455-456, 608. The FHLBB likewise made that determination in approving the assistance agreement in connection with CalFed's acquisition of Southeast. See 2 C.A. App. A5000207. No such determination was made for CalFed's acquisitions of Brentwood and Family—for the simple reason that FSLIC provided no guarantee or other financial assistance to CalFed in connection with its acquisition

of those thrifts. These starkly different modes of proceeding confirm that, unlike in *Winstar*, FSLIC did not enter into a guarantee contract in this case.

In short, what is missing in this case is any indication —such as was present in *Winstar*—that the regulators and CalFed intended to (and did) convert the Bank Board's regulatory approvals of the transactions and the accompanying regulatory treatment of goodwill into contractual commitments. A court cannot properly find the existence of a contract—especially an "express" one, see 01-592 Pet. App. 88a & n.21—between the United States and a private party based on the issuance of documents by a federal agency that constitute regulatory approval of a private transaction. To find a contract on the basis of actions by a federal agency in executing a regulatory law would not only violate ordinary principles of contract formation and administrative law, but would also violate the prohibition under the Tucker Act against recognizing contracts implied in law. See *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5 (1980) (per curiam); *United States* v. *Algoma Lumber Co.*, 305 U.S. 415, 418 (1939).

The courts below erroneously framed the government's contention to be that "the absence of an assistance agreement incorporating the forbearance letters precludes a finding that a contract existed in the Brentwood and Family transactions," 01-592 Pet. App. 5a, see also *id.* at 86a ("Absence of a written Assistance Agreement *per se* eliminates any possibility that" there was a contract). Of course, contrary to the court of appeals' view that the existence of such an agreement is "irrelevant" (see *id.* at 6a), the absence of such an assistance agreement strongly supports the conclusion that the actions by the FHLBB and FSLIC in approving CalFed's acquisitions of Brentwood and Family

were not contracts and should at least have precluded a grant of summary judgment against the government. Moreover, the presence of express agreements in *Winstar* and in the Southeast transactions and the exceptional nature of those agreements suggest that it would be remarkable for a regulatory agency to make similar undertakings in an oral or implicit contract. In any event, the more fundamental point is not that an Assistance Agreement was absent from the record for these transactions, but that there was *nothing present* in the record that would permit—much less compel—the conclusion that there *were* contracts. In a situation in which regulatory approval is required for a private entity to engage in a transaction, a determination by a court that the government has entered into a contract must be based on something more than a record of regulatory approval. There must be a manifestation of an intent to enter into a contract embodied in documents or conduct aside from the documents that record the agency's approval and the mere give-and-take of the regulatory process.[3]

3. The court of appeals' conclusion that a simple regulatory approval of a regulated entity's transaction

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[3] The Fourth Circuit in *Charter Federal Savings Bank* v. *Office of Thrift Supervision*, 976 F.2d 203 (1992), cert. denied, 507 U.S. 1004 (1993), also addressed a *Winstar*-related case in which the documents, like those here, were entirely consistent with a regulatory approval and manifested no intent to form a contract. The court noted that "no express, written contract exist[ed] between the parties," *id.* at 210-211, and that in that respect the case "differ[ed] from similar supervisory goodwill cases, which have all involved written agreements between the complaining thrift and the FHLBB or FSLIC." *Id.* at 211. The court concluded that for that reason it was "reluctant to rule that a contract exists," *ibid.*, but it ultimately decided the case on other grounds.

may be construed to create a contract between the government and the regulated entity conflicts with long-standing principles of administrative law. "Congress delegated power to the [Bank] Board expressly for the purpose of creating and regulating federal savings and loans so as to ensure that they would remain financially sound institutions able to supply financing for home construction and purchase." *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 168 (1982). The Bank Board was charged with making federal policies to govern the thrift industry and to exercise its delegated authority in service of those policies. The regulated entities, however, had no assurance that those policies would remain unchanged in the future or that they would not be subject to new or different requirements as the regulatory scheme unfolded. Nor did the regulated entities have any expectation that the government would bear the costs if new or different regulations were adopted that increased their costs.

To the contrary, although the Bank Board's actions were of course subject to the constraints imposed by its own organic statute and the Administrative Procedure Act, see, *e.g.*, *Getty* v. *FSLIC*, 805 F.2d 1050 (D.C. Cir. 1986) (unsuccessful bidder to acquire troubled thrift successfully challenged award under the APA), those sources of authority easily accommodate agency alterations of its policies and changes in the regulatory environment. "An agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt its rules and policies to the demands of changing circumstances." *Rust* v. *Sullivan*, 500 U.S. 173, 186-187 (1991)) (internal quotation marks, brackets, and citations omitted); see *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990);

Chevron U.S.A., Inc. v. *NRDC, Inc.*, 467 U.S. 837, 862 (1984). That is especially so in the context of banking, in which regulatory agencies and Congress might be required to revise existing laws and policies to protect the banking system and the public.

Under the court of appeals' holding, however, the Bank Board's exercise of delegated regulatory authority committed the United States to a contractual obligation to make regulated entities financially whole when a change in the regulatory regime ensued. As this Court explained in addressing an analogous situation in *National Railroad Passenger Corp.* v. *Atchison, Topeka, & Santa Fe Railway*, 470 U.S. 451, 466-467 (1985), "absent 'an adequate expression of an actual intent' of the State to bind itself, this Court simply will not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the State is a party" (citation omitted). *National Railroad Passenger Corp.* involved a claim that a statute, rather than a regulatory action, constituted a contract between the government and private entities. But the underlying rule in both instances is that "the principal function of a legislature [or regulatory agency] is not to make contracts, but to make laws that establish the policy of the State." *Id.* at 466. "Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws [or regulatory actions] as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative [or administrative] body." *Ibid.*

The rationale of *National Railroad Passenger Corp.* is rooted in fundamental principles that distinguish between the action of the government as lawmaker and the action of the government as a contracting entity.

See also *Wisconsin & Michigan Ry.* v. *Powers*, 191 U.S. 379, 387 (1903) (announcement of government policy in a statute "simply indicates a course of conduct to be pursued until circumstances or its views of policy change"). Because that distinction is so fundamental, "absent 'an adequate expression of an actual intent' of the State to bind itself, this Court simply will not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the State is a party." 470 U.S. at 466-467 (citation omitted). The court of appeals' holding that the Bank Board's regulatory approval of the Brentwood and Family transactions was a contractual commitment by the government—where there was no "adequate expression of an actual intent" of the government to bind itself by contract—violated that bedrock principle. To imply a contractual undertaking from a regulatory approval is impermissible, because in this case, as in *National Railroad Passenger Corp.*, "[t]he continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation." *Keefe* v. *Clark*, 322 U.S. 393, 397 (1944) (quoting *Charles River Bridge* v. *Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837)).

4. The court of appeals' determination that the federal regulatory approvals of CalFed's acquisitions of Brentwood and Family not only may but *must* be construed as government contracts is of potentially broad significance. Its most immediate effect is likely to be on the more than 100 *Winstar*-related cases currently pending in the Court of Federal Claims and the Federal Circuit. The government has asserted liability defenses in approximately one-half of the transactions at issue in those cases, based on the proposition that no

contract was formed, because all that took place in each case was regulatory approval of a private entity's proposed merger or acquisition. The court of appeals' conclusion that the record in this case is sufficient to support a finding that the regulatory approval was in fact a contract can be expected to have a substantial influence on those cases.

More generally, the court of appeals' holding will be used to argue that federal regulatory agencies exercising their regulatory responsibilities to review private transactions in other areas also have given out contractual guarantees. That is a deeply troubling prospect, because it would threaten to replace ordinary review of agency action under the Administrative Procedure Act with entirely different standards applicable to contractual commitments.[4] It also threatens to

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[4] Before its decision in this case, the Federal Circuit and its predecessor had recognized the need to find evidence of contractual intent before finding that standard regulatory actions were actually contractual undertakings. See, *e.g.*, *Cienega Gardens* v. *United States*, 162 F.3d 1123, 1136 (Fed. Cir. 1998), cert. denied, 528 U.S. 820 (1999) (distinguishing *Winstar* and rejecting claim by owners of housing units that Department of Housing and Urban Development had contracted with them, on the ground that "[t]he plaintiffs in *Winstar* had contracts with integration clauses that expressly incorporated contemporaneous documents that allowed them to use supervisory goodwill," while plaintiff owners of housing units "can point to no similar contractual provisions"); *New Era Constr.* v. *United States*, 890 F.2d 1152, 1155 (Fed. Cir. 1989) ("[T]he government's involvement in the financing and supervision of a contract between a [state] agency and a private contractor does not create a contract between the government and the contractor."); *Aetna Cas. and Sur. Co.* v. *United States*, 655 F.2d 1047, 1052 (Ct. Cl. 1981) ("[W]here the United States does not make itself a party to the contracts which implement important national policies, no express or implied contracts result between the United States and those who will ultimately perform the work."); *D.R.*

convert regulatory agencies into insurers against statutory changes and replace the ordinary remedy of setting aside agency action or remanding in instances of unlawful agency action with an entirely new remedy of contract damages. In an action under the APA, the court may "compel agency action unlawfully withheld or unreasonably delayed" and "hold unlawful and set aside agency action" that fails to satisfy the APA's standards. 5 U.S.C. 706. Money damages are not available. 5 U.S.C. 702 (a suit "seeking relief *other than money damages* * * * shall not be dismissed nor relief therein be denied on the ground that it is against the United States") (emphasis added); see also 28 U.S.C. 2680(a) (Federal Tort Claims Act bars "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute be valid").

The APA's preclusion of money damages reflects the fundamental difference between the government's actions as regulator and its actions as a contracting party. The decision below blurs—indeed obliterates—that line by dismissing the absence of an agreement reflecting a distinct contractual undertaking as insignificant. If the Court grants review of the damages issues at this time, it should grant this conditional cross-petition to redefine that critical line.

Smalley & Sons, Inc. v. *United States*, 372 F.2d 505, 507 (Ct. Cl.), cert. denied, 389 U.S. 835 (1967).

CONCLUSION

If the Court grants the petition for a writ of certiorari in *California Federal Bank, FSB* v. *United States*, No. 01-592, it should also grant this cross-petition for a writ of certiorari.

Respectfully submitted.

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NOVEMBER 2001

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* The Solicitor General is disqualified in this case.

APPENDIX

1. Section 1464(a) of Title 12 of the United States Code (1982) provided:

> In order to provide thrift institutions for the deposit or investment of funds and for the extension of credit for homes and other goods and services, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, opertion, and regulation of associations to be known as Federal savings and loan associations, or Federal savings banks, and to issue charters therefor, giving primary consideration to the best banking practices of thrift institutions in the United States. The lending and investment authorities are conferred by this section to provide such institutions the flexibility necessary to maintain their role of providing credit for housing.

2. Section 1730(q)(1) of Title 12 of the United States Code (1982) provided in relevant part:

> No person, acting directly or indirectly or through or in concert with one or more other persons, shall acquire control of any insured institution through a purchase[,] assignment, transfer, pledge, or other disposition of voting stock of such insured institution unless the Corporation has been given sixty days' prior written notice of such proposed acquisition and within that time period the Corporation has not issued a notice disapproving the proposed acquisition or extending up to another thirty days the period during which a disapproval may issue. * * * An acquisition may be made prior to expiration of the disapproval period if the Corporation

issues written notice of its intent not to disapprove the action.

3. Section 1730(q)(6) of Title 12 of the United States Code (1982) provided in pertinent part:

> Except as otherwise provided by regulation of the Corporation, a notice filed pursuant to this subsection shall contain the following information:
>
> * * * * *
>
> (C) The terms and conditions of the proposed acquisition and the manner in which the acquisition is to be made.

4. Section 1730a(e)(1) of Title 12 of the United States Code (1982) provided in pertinent part:

> It shall be unlawful for—
>
> (A) any savings and loan holding company directly or indirectly, or through one or more subsidiaries or through one or more transactions—
>
> (i) to acquire, except with the prior written approval of the Corporation, the control of an insured institution or a savings and loan holding company, or to retain the control of such an institution or holding company acquired or retained in violation of this section as heretofore or hereafter in effect;
>
> (ii) to acquire, except with the prior written approval of the Corporation, by the process of merger, consolidation, or purchase of assets, another insured or uninsured institution or a savings and loan holding company, or all or substantially all of

the assets of any such institution or holding company.

Supreme Court, U.S.
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No. 01-698

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

CALIFORNIA FEDERAL BANK, FSB,

Respondent.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Based upon this Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), both courts below found that the undisputed facts established that the government had entered into valid and binding contracts with respondent California Federal Bank, FSB. The sole question presented by the government's cross-petition is whether this Court should revisit those concurring determinations.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

All of the parties to the proceedings in the court of appeals are listed in the caption of this petition. California Federal Bank, FSB is a wholly owned subsidiary of Golden State Holdings, Inc., which in turn is a wholly owned subsidiary of Golden State Bancorp, Inc.

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IN THE

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No. 01-698

UNITED STATES,

Petitioner,

v.

CALIFORNIA FEDERAL BANK, FSB,

Respondent.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent California Federal Bank, FSB ("CalFed") respectfully submits this brief in opposition to the government's conditional cross-petition for a writ of certiorari.[1]

OPINIONS BELOW

The opinion of the court of appeals (01-592 Pet. App. 1a-15a) is reported at 245 F.3d 1342 (2001). The opinion of the Court of Federal Claims regarding liability (01-592 Pet. App. 48a-101a) is reported at 39 Fed. Cl. 753 (1997), and the opinion of the Court of Federal Claims regarding remedies (01-592 Pet. App. 17a-47a) is reported at 43 Fed. Cl. 445 (1999).

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[1] CalFed's separate petition for a writ of certiorari is pending in this Court as No. 01-592.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2001. A timely petition for rehearing was denied on July 10, 2001. 01-592 Pet. App. 16a. CalFed's petition for a writ of certiorari in No. 01-592 was docketed on October 9, 2001. The government's conditional cross-petition for a writ of certiorari in No. 01-698 was docketed on November 19, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On summary judgment, the Court of Federal Claims found that the undisputed evidence in this case established that the government had entered into a *Winstar*-type contract with CalFed to allow CalFed to include goodwill resulting from three supervisory mergers as regulatory capital for specified periods. *See generally United States v. Winstar Corp.*, 518 U.S. 839 (1996) (holding that United States is liable for breach of goodwill contracts). The Federal Circuit, which reviewed the trial court's liability determination *de novo*, affirmed.

I. The Savings and Loan Crisis and FIRREA

During the early 1980s, in the midst of the worst savings and loan crisis since the Great Depression, the federal government found itself facing deposit insurance liabilities that threatened to bankrupt the government's insurance fund. *Winstar*, 518 U.S. at 846-47. As a means of avoiding insurance liability, and as an alternative to government takeovers of failing thrifts, the government encouraged healthier thrifts, such as CalFed, to take over the failing thrifts through so-called "supervisory mergers." *Id.* at 847.

As this Court stated in *Winstar*, "the principal inducement for these supervisory mergers was an understanding that the acquisitions would be subject to a particular accounting treatment that would help the acquiring institutions meet their reserve capital requirements

imposed by federal regulations." *Id.* at 848. This special regulatory accounting treatment was essential because it permitted the acquiring institutions to count the liabilities of the acquired failing thrifts as "supervisory goodwill," *i.e.*, as an asset for purposes of regulatory capital requirements. *Id.* at 849-50; *id.* at 921 (Scalia, J., concurring in judgment) (goodwill promises were the "*sine qua non*" of the supervisory mergers). This use of supervisory goodwill allowed the acquiring thrifts to meet their regulatory obligations and "to leverage more loans (and [they] hoped, make more profits)." *Id.* at 851. The acquiring thrifts were allowed to amortize the supervisory goodwill obtained in the acquisitions over extended periods (up to 40 years), which further allowed the thrifts to satisfy regulatory capital requirements. *Id.* at 852-53.

The federal thrift regulators approved hundreds of supervisory mergers in the 1980s, *id.* at 847 n.3, including three with CalFed that are at issue in this case. As detailed below, and as the courts below held, in each of these transactions the government promised CalFed that it could amortize supervisory goodwill over periods ranging from 35 to 40 years and could include the unamortized goodwill in calculating regulatory capital.

In 1989, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, which made enormous changes in the structure of federal thrift regulation. *Winstar*, 518 U.S. at 856. Most important for present purposes, FIRREA mandated the promulgation of regulations requiring thrifts to maintain levels of regulatory capital that could not include supervisory goodwill (either immediately or after a 5-year phase-out). *Id.* at 857. In effect, the FIRREA-mandated regulations eliminated the favorable treatment of goodwill promised by the government as the principal inducement to hundreds of thrifts involved in supervisory mergers.

In *Winstar*, which involved three "test" cases, this Court held that the new regulatory capital requirements imposed by FIRREA breached the goodwill contracts arising out of the supervisory mergers. 518 U.S. at 870. Rejecting any notion that the government was entitled to "special rules" when contracting, the Court reaffirmed "the general principle that, 'when the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'" *Id.* at 895 (citation omitted). The Court explained that the goodwill contracts, which were based upon the acquiring thrifts' assumption of the failing thrifts' liabilities, involved the transfer of valuable consideration designed to prevent or mitigate an impending crisis in the thrift industry and thereby save the government's insurance fund from financial collapse. *Id.* at 886-87, 869, 906, 908; *id.* at 918 (Breyer, J., concurring); *id.* at 919 (Scalia, J., concurring in judgment). Accordingly, the Court affirmed the Federal Circuit's finding of liability and remanded the cases for a determination of remedies. *Id.* at 910.

II. The CalFed Transactions

In the early 1980s, CalFed entered into supervisory merger agreements with the government in connection with three separate transactions: the "Southeast" transaction, the "Brentwood" transaction, and the "Family" transaction. In each instance, the government's goodwill promises induced CalFed, which "was a relatively healthy thrift" (01-592 Pet. App. 18a), to acquire thrifts on the verge of failure. The government now concedes that the Southeast transaction resulted in a goodwill contract that the government breached, Pet. 4, but nonetheless asserts that no contract arose from the Brentwood and Family transactions. Those two transactions were identical to the Southeast transaction in all material respects, except that neither had an "Assistance Agreement" because, unlike in Southeast, the govern-

ment provided no financial assistance as part of the transactions.

A. Southeast

In late 1981, CalFed agreed to merge with three Georgia thrifts and one Florida thrift (collectively, "the Southeast institutions"). The merger agreement was conditioned on the Federal Savings and Loan Insurance Corporation (FSLIC) and the Federal Home Loan Bank Board (FHLBB) granting "regulatory forbearances including net worth compliance waivers satisfactory to California Federal" and "an indemnity agreement for unknown material events and other contingencies." A5002175.[2]

CalFed proceeded to negotiate with the government, offering to acquire the Southeast institutions in exchange for $9 million in assistance, a forbearance by the FHLBB and the FSLIC from "any action against California Federal . . . for failure to comply with reserve and net worth requirements and scheduled item limitations insofar as such noncompliance is due to the acquisition of" the Southeast institutions, and the amortization over thirty to forty years of any goodwill resulting from the acquisition, as well as the right to include the unamortized goodwill in regulatory capital. A5002171-73.

The FSLIC accepted CalFed's offer. In February 1982, the FSLIC and CalFed entered into an "Assistance Agreement" providing that in partial exchange for assuming the Southeast institutions' $305.67 million in net liabilities, CalFed would receive a $9 million capital credit from the FSLIC. 01-592 Pet. App. 2a. CalFed also received a forbearance letter permitting the excess liabilities to be recorded as supervisory goodwill to be includable as regulatory capital and amortized over 35

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[2] Unless otherwise indicated, all record references are to the Joint Appendix filed with the Federal Circuit.

to 40 years. *Id.* The Assistance Agreement included a provision incorporating the forbearance letter. *Id.* at 2a-3a.

B. Brentwood

In 1982, CalFed agreed to acquire the Brentwood Savings and Loan Association and assume $314.63 million in net liabilities from the failing thrift. 01-592 Pet. App. 3a. As in the Southeast transaction, CalFed's agreement with Brentwood was conditioned on it securing from the FSLIC and the FHLBB certain regulatory forbearances, as well as an agreement to include the supervisory goodwill resulting from the acquisition in calculating regulatory capital. A5002254-64; A5002329-31.

Once it had entered into a conditional agreement with the thrift, CalFed, as it had in the Southeast transaction, proceeded to negotiate with the government. CalFed proposed to acquire Brentwood in exchange for receiving the same sort of forbearances and waivers the government had agreed to in the Southeast transaction. A5002332-33. In particular, CalFed requested the FHLBB's approval of "the amortization [over 35 years] of any goodwill created." A5002325; 01-592 Pet. App. 3a. CalFed noted that its acquisition of the failing thrift would "avoid great expenditures of resources of the FSLIC" and emphasized that "[t]he types of waivers and forbearance requested are important to CalFed in providing an adequate basis for CalFed's management and directors to finalize the proposed transaction." A5002331, 5002334.

The government concluded that "FSLIC assistance" would be "necessary" without the CalFed merger. A2000242, A200249. Consequently, on September 30, 1982, the FHLBB approved the Brentwood acquisition, recommending in an internal memorandum that amortization of supervisory goodwill "be granted" and stating that the "association should be allowed to use regulatory

accounting procedures in reports to the Board." A5002595. The next day, the FHLBB issued a forbearance letter stipulating, per CalFed's request, that the resulting association could amortize over 35 years any goodwill created by the acquisition and count that goodwill for regulatory capital purposes. 01-592 Pet. App. 3a. The FHLBB also agreed not to enforce its net worth requirements for a period of five years to the extent that CalFed's failure to meet the requirements was attributable to the assets or liabilities acquired from Brentwood. *Id.*

Unlike CalFed's offer in the Southeast transaction, its Brentwood offer did not request a cash payment. Consequently, the Brentwood transaction did not involve an Assistance Agreement. 01-592 Pet. App. 3a.

C. Family

The next year, 1983, CalFed entered into a contract with Family Savings and Loan Association to acquire that Nevada thrift. As in the Southeast and Brentwood transactions, CalFed conditioned the merger agreement on the FHLBB's approving the amortization over 40 years of any goodwill created, and on the government's granting certain regulatory forbearances. A52002340-44.

Just as in the Southeast and Brentwood transactions, CalFed then submitted its merger application to the government, again conditioning its proposal to acquire Family upon the regulators' approval of the now-familiar forbearances and waivers, including the right to amortize the goodwill produced by the acquisitions over 40 years and to include the unamortized goodwill in regulatory capital. 01-592 Pet. App. 3a. The FHLBB characterized CalFed's submission as an "offer submitted" and a "proposal . . . acceptable to the FSLIC" that would "present the lowest expense to the Corporation." A5002557. In a resolution dated January 5, 1983 and a forbearance letter of the same date, the government ac-

cepted CalFed's offer. A5002559-60, A5002624-26; 01-592 Pet. App. 3a. CalFed assumed $17.74 million in net liabilities through the acquisition. 01-592 Pet. App. 3a.

As in the Brentwood transaction, because CalFed did not request a cash payment, its agreement with the government did not involve an Assistance Agreement. 01-592 Pet. App. 3a.

III. Proceedings Below

Relying on *Winstar* and black-letter contract law, then-Chief Judge Smith of the Court of Federal Claims granted summary judgment in favor of CalFed as to the issue of liability in all three transactions. 01-592 Pet. App. 101a. He began by observing that "[b]ecause the dollars at stake appear to be so large the government has raised legal and factual arguments that have little or no basis in law, fact or logic," and specifically noted the government's efforts "to relitigate the core *Winstar* liability issues in every case." *Id.* at 49a.

After reviewing the extensive documentary record surrounding each of the three CalFed transactions, Judge Smith held that in each case, the government made binding contractual promises regarding the use of goodwill in order to induce CalFed into acquiring the net liabilities of the failing thrifts. He expressly rejected the government's contention that an "assistance agreement" is a necessary element of a *Winstar*-type contract: "[T]he factual record[ ] . . . show[s] intent to contract with the government for specified treatment of goodwill, and documents such as correspondence, memoranda, and Bank Board resolutions confirm that intent . . . . [T]he absence of an [Assistance Agreement]

should be irrelevant to the finding that a contract existed." 01-592 Pet. App. 87a.[3]

The court of appeals, which reviewed the question of contract formation *de novo*, affirmed Judge Smith's liability determinations. 01-592 Pet. App. 5a-9a. Citing the "contemporaneous documents and surrounding circumstances that included forbearance letters," the Federal Circuit held that the government entered into legally binding goodwill contracts in each of the three CalFed transactions. *Id.* at 5a. The court explained that the absence of an Assistance Agreement in the Brentwood and Family transactions "is not dispositive of the issue of contract formation between the government and CalFed," and agreed with the lower court that "the factual record" surrounding the transactions established the existence of legally binding contracts. *Id.* at 6a.

The court of appeals' ruling, like Judge Smith's, rested on a close review of the documentary evidence: "Based on all of the contemporaneous documents in each of the three transactions, the FHLBB and the FSLIC were contractually bound to recognize the supervisory goodwill and the amortization periods reflected in the forbearance letters." *Id.* The Federal Circuit concluded that "[i]t is clear from the documents" that the parties manifested an intent to enter into a legally binding contract, and further observed that "[t]he documentary evidence for both the Brentwood and Family transactions" was "precisely the type of evidence relied upon by the *Winstar* courts to establish the existence of contracts between acquiring thrifts and the government." *Id.* at 8a-9a. Consequently, "[j]ust as in *Winstar* . . . all

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[3] Following the grant of summary judgment as to liability, the remedies portion of CalFed's case was transferred to Judge Hodges for trial. The decisions of Judge Hodges and the Federal Circuit on remedies are the subject of CalFed's petition in No. 01-592. *See* note 6, *infra*.

of the necessary elements of contract formation are here, and the parties are bound by the terms of that contract." *Id.* at 7a.

ARGUMENT

The government's conditional cross-petition represents merely its most recent attempt to evade responsibility for the promises it made during the thrift crisis of the 1980s and subsequently repudiated. Rather than accept liability for breaching its contracts with CalFed, the government seeks to relitigate the same question decided against it in *Winstar* itself, which was faithfully followed by the lower courts in this case.

After an extensive review of the contemporaneous documentary record and the surrounding factual circumstances, the Court of Federal Claims and the United States Court of Appeals for the Federal Circuit both concluded that the government made contractual goodwill promises in exchange for CalFed's acquisition of Brentwood and Family. Further review of that determination, which is supported by the undisputed evidence in the summary judgment record, and necessarily follows from a straightforward application of this Court's decision in *Winstar*, is unwarranted.

I. The Government Has Offered No Reason For This Court To Revisit The Factual Findings Of Both Courts Below

The government invites this Court to undertake a third review of the documentary evidence surrounding the Brentwood and Family transactions, and render a decision reversing the finding of the two lower courts. The government does not argue that the courts below applied an improper legal standard, but rather contends that there is no "evidence of a mutual intent to contract," Pet. 19, and insists that "there was nothing present in the record that would permit . . . the conclusion that there were contracts." Pet. 23 (emphasis omitted). Indeed,

the government devotes several pages of its petition to a discussion of its interpretation of the record evidence and whether "the documents suggest[ ] an exchange of contractual commitments." Pet. 17; *see also* Pet. 16-19 (requesting this Court's review of, *inter alia*, various merger applications, correspondence between CalFed and Bank Board, resolutions adopted by Bank Board, forbearance letters, and internal CalFed documents).

The government thus asks this Court to undertake precisely the kind of case-specific factual review that this Court expressly *declined* to perform in *Winstar* itself. In *Winstar*, as here, the Federal Circuit had affirmed the trial court's summary judgments as to contract liability. *See* 64 F.3d 1531, 1540-44 (Fed. Cir. 1995) (en banc). While this Court granted the government's petition to consider (and, ultimately, reject) the availability of certain defenses asserted by the government, the Court left undisturbed the lower courts' determinations that the goodwill contracts at issue had been formed: *"[W]e are in no better position than the Federal Circuit and the Court of Federal Claims to evaluate the documentary records of the transactions at issue."* 518 U.S. at 860-61 (emphasis added). So, too, here. The government has not even attempted to explain why, in the circumstances of *this* case, this Court is in any better position than either court below to resolve the question whether the contemporaneous evidence establishes the existence of goodwill contracts. That is undoubtedly because, as in *Winstar* itself, the question of contract formation in this case reflects the application of settled legal principles to undisputed facts—an inadequate basis for plenary review by this Court. As the Court explained in *United States v. Johnston*, 268 U.S. 220, 227 (1925), "[w]e do not grant a certiorari to review evidence and discuss specific facts."

The *Winstar* Court's acceptance of the lower courts' determinations regarding contract formation was simply

a particularized application of the "two-court rule," which provides that when two lower courts agree on the facts, this Court will not conduct its own independent review of the evidentiary record absent extraordinary circumstances. *See generally* Stern et al., *Supreme Court Practice* § 4.14 at 189 (7th ed. 1993). Indeed, the Court has made "repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'" *Berenyi v. District Director*, 385 U.S. 630, 635 (1967) (quoting *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949)). *See also Exxon Co. v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996) (declining to reconsider factual conclusion of lower courts when petitioner failed to make an "obvious and exceptional showing of error") (citation omitted); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (when "both courts below hav[e] agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task"); *United States v. Doe*, 465 U.S. 605, 614 (1984) ("Traditionally, we . . . have been reluctant to disturb findings of fact in which two courts below have concurred").

The two-court rule is an insurmountable obstacle to the government's request that this Court re-examine the factual findings in which both lower courts have concurred. A party seeking an exception to the two-court rule bears a "heavy burden," *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975), and the government falls far short of making "a very obvious and exceptional showing of error." *Berenyi*, 385 U.S. at 635. In fact, as explained *infra*, the court of appeals conducted a careful and thorough review of the evidentiary record in concluding that the government and CalFed manifested a mutual intention to contract. That the government interprets the evidence differently can hardly justify disturbing the considered judgment of the

two lower courts that have reviewed the documents in question and reached identical conclusions.

II. The Decision Below Rests On A Straightforward Application Of *Winstar* And Is Consistent With Settled Principles Of Contract And Administrative Law

1. The government does not claim that the decision below conflicts with *Winstar*. Instead, the government devotes its energies to attempting to distinguish *Winstar*, in which this Court recognized that the government's goodwill promises induced numerous acquisitions of failing thrifts and constituted binding contracts. The basis for the government's purported distinction is the fact that the transactions at issue in *Winstar* involved Assistance Agreements that included integration clauses, whereas the Brentwood and Family transactions did not. Pet. 19. The absence of an Assistance Agreement also serves as the government's sole basis for distinguishing the Brentwood and Family transactions from the Southeast transaction, which served as the model for the subsequent Brentwood and Family transactions, and which the government concedes resulted in a contract.

As the lower courts correctly recognized, the absence of an Assistance Agreement containing an integration clause is not a material failing where, as here, there is a record of contemporaneous documents evidencing a mutual intent to contract. In its *Winstar* ruling, the Federal Circuit held that "all of the contemporaneous documents"—including, as here, FHLBB resolutions and correspondence between the Bank Board and acquiring institutions—established that the government had entered into goodwill contracts. 64 F.3d at 1540-44. This Court agreed that "the realities of the transaction" demonstrated that the contemporaneous documents were "contractual commitments, not mere statements of policy." 518 U.S. at 863.

The courts below faithfully applied the teaching of *Winstar* in focusing on "the realities of the transaction" and scrutinizing the contemporaneous documents surrounding each acquisition. Both lower courts analyzed each element of contract formation—offer, acceptance, and consideration—and determined, based on the undisputed facts and a careful comparison between the documentary evidence in this case and the original *Winstar* cases, that the government entered into binding contracts with CalFed.

The Federal Circuit agreed with the trial court that "'the factual record[ ] . . . show[s] intent to contract with the government for specified treatment of goodwill, and documents such as correspondence, memoranda and [FHLBB] resolutions confirm that intent.'" 01-592 Pet. App. 6a (quoting *id.* at 87a). The court of appeals stated that, "[b]ased on all of the contemporaneous documents in each of the three transactions," it had "no doubt that both the government and Cal Fed provided consideration for the agreements," and that "the FHLBB and the FSLIC were contractually bound to recognize the supervisory goodwill and the amortization periods reflected in the forbearance letters." *Id.* Accordingly, the court properly concluded that "[j]ust as in [*Winstar*], all of the necessary elements of contract formation are present here, and the parties are bound by the terms of that contract." *Id.*

The conclusion of both lower courts that goodwill contracts were formed is plainly correct. In each of the three transactions, CalFed made an offer to contract with the government, promising to acquire one or more failing thrifts in exchange for the right to include supervisory goodwill in calculating its regulatory capital. *See* A5002171-73, A5002174-83 (Southeast offer); A5002254-64, A5002329-31 (Brentwood offer); A5002335-46, A5002557 (Family offer). The government accepted each of these offers. *See* A5002162 (acceptance of Southeast offer by FHLBB resolution);

A5002319-24 (acceptance of Brentwood offer by FHLBB resolution and forbearance letter); A5002548-61 (acceptance of Family offer by FHLBB resolution and forbearance letter). And each side provided consideration: CalFed assumed the assets and liabilities of the acquiring institutions (which converted the government's obligations into obligations of CalFed), whereas the government pledged favorable regulatory treatment (and in the case of Southeast, cash assistance).

The government concedes that a contract was formed in the Southeast transaction, Pet. 4, and the *sole* difference between that transaction and the Brentwood and Family transactions is the existence of an Assistance Agreement that happened to include an integration clause. But the undisputed, contemporaneous evidence established that the regulators did not view the presence or absence of an Assistance Agreement as having any bearing on the government's obligations. Assistance Agreements were included only in transactions that involved substantial cash payments by the government, and were never intended to distinguish between contractual and regulatory actions. As D. James Croft, the government's senior regulator at the time, who was ultimately responsible for approving all three transactions at issue, has averred: "An acquiring institution, such as CalFed, would have had the same level of assurance as to the treatment of goodwill in both types of transactions, and the FHLBB certainly did not draw a distinction nor intend that acquiring institutions draw any distinctions as to the treatment of goodwill between assisted and unassisted transactions." A5002914-15; *see also id.* (according to Dr. Croft, Assistance Agreements "had no effect on the nature or extent to which the FHLBB believed itself bound by its agreement").

Moreover, the government's assertion that "a separate contract" containing an integration clause "was necessary to convert regulatory documents into contractual undertakings" (Pet. 20) defies black-letter contract

law, for "it is well-settled law that several writings executed between the same parties . . . may be read together as forming parts of one transaction." *Bailey v. Railroad Co.*, 84 U.S. 96, 108 (1872). *See also Ryan v. United States*, 136 U.S. 68, 83 (1890) ("a complete contract . . . may be gathered from letters, writings and telegrams between the parties"); 1 A. Corbin, *Corbin on Contracts* § 2.10 at 165, 171 (1993); I E. Farnsworth, *Farnsworth on Contracts* § 3.3 at 187 (1998). Thus, contracts need not have an integration clause to be binding (or even integrated), regardless of how many documents are involved. *Restatement (Second) of Contracts* § 209 & cmt. *b* (1983); 3 A. Corbin, *Corbin on Contracts* § 573 at 359 n.3 (1960); *Steinke v. Sungard Fin. Sys., Inc.*, 121 F.3d 763, 771 n.5 (1st Cir. 1997).[4]

The government's argument ultimately amounts to a claim that, in determining whether a contract existed, the court below gave inadequate weight to the absence of an Assistance Agreement containing an integration clause. Pet. 22-23. But even were this the case (and it is not), a miscalculation in weighing the evidence hardly constitutes legal error meriting this Court's review.

2. The government renews its contention, rejected once already by this Court in *Winstar*, that the lower court confused regulatory action with contractual undertakings. Pet. 14-15. This theme permeates the govern-

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[4] The government's reliance on *Charter Federal Savings Bank v. OTS*, 976 F.2d 203 (4th Cir. 1992), for the proposition that "regulatory" documents cannot manifest the government's intent to form a contract (Pet. 23 n.3), is misplaced. The *Charter* court acknowledged that the forbearance letter at issue "may constitute an express agreement, [but] its terms have expired and it is now moot." 976 F.2d at 211 n.11. Moreover, the *Charter* court based its decision on the government's broad reading of the "unmistakability" doctrine, *id.* at 212, a reading that was rejected by this Court in *Winstar*.

ment's petition. In the government's view, the lower court's misreading of regulatory approvals as contractual commitments "conflicts with long-standing principles of administrative law" and "threaten[s] to replace ordinary review of agency action under the Administrative Procedure Act with entirely different standards applicable to contractual commitments." Pet. 24, 27.

The government's attempt to distinguish between the FHLBB's and FSLIC's "contractual" undertakings and their "regulatory" undertakings is nothing less than an attempt to reargue *Winstar*, where the Court held that "[t]he inescapable conclusion . . . is that the Government's 'regulatory' and 'nonregulatory' capacities were fused in the instances under consideration." 518 U.S. at 893-94. Indeed, the Court dismissed as "fundamentally implausible" the government's theory that goodwill promises were simply matters of regulatory grace, and noted that the government was protecting its own financial interests by "convert[ing] some of its financial insurance obligations into responsibilities of private entrepreneurs." *Id.* at 862-63, 894. *Winstar* thus makes clear that the government acted as both a regulator *and* a contractor in making the goodwill promises, and it is liable to the injured parties for breaching those contractual commitments.[5]

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[5] Although the government characterizes the decision below as "deeply troubling" and warns of dire consequences for administrative and contract law should the ruling stand, Pet. 27, its ostensible concern is undercut by its decision to file only a conditional cross-petition. In any event, the Federal Circuit's post-*Winstar* decisions amply demonstrate that, contrary to the government's unfounded concerns, the lower courts have declined to read *Winstar* as authorizing a departure from established law. *See, e.g., Cienega Gardens v. United States*, 162 F.3d 1123, *superseded by* 194 F.3d 1231 (Fed. Cir. 1998). Tellingly, the government's conditional cross-petition fails to cite a single case supporting its fears that contract actions would operate to replace review of

3. The government also argues that the decision below is inconsistent with the principle set forth in *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 466-67 (1985), that "absent 'an adequate expression of an actual intent' of the State to bind itself, this Court simply will not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the State is a party." The government claims the lower courts erred because the FHLBB and the FSLIC did not provide an "adequate expression" of the government's intent to be bound. Pet. 25-26.

This argument is a transparent attempt to revive the "unmistakability" doctrine the government unsuccessfully urged upon this Court in *Winstar*. In *Winstar*, the government, as here, argued that the thrifts needed to show that the government had made a clear and unequivocal statement of intent to be bound before it could be deemed to have entered into a contract. Specifically, the government contended that "contracts that limit the government's future exercises of regulatory authority . . . will be recognized only rarely, and then only when the limitation on future regulatory authority is expressed in unmistakable terms." 518 U.S. at 871 (quoting Brief for United States at 16).

The plurality opinion rejected the argument, explaining that "[s]ince the facts of the present case demonstrate that the Government may wish to further its regulatory goals through contract, we are unwilling to adopt any rule of construction that would weaken the Government's capacity to do business by converting every contract it makes into an arena for unmistakability litigation." *Id.* at 886. As Justice Souter explained for the plurality, there was "no need for an unmistakably

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agency actions that should properly proceed under the Administrative Procedure Act.

clear 'second promise' not to change the capital requirements," adding that "it is sufficient that the Government undertook an obligation that it subsequently found itself unable to perform." *Id.* at 887. While Justice Scalia's concurring opinion did not reject the applicability of the unmistakability doctrine *per se*, he declared that "the doctrine has little if any independent legal force beyond what would be dictated by normal principles of contract interpretation." *Id.* at 920 (Scalia, J., concurring in judgment). Significantly, the government does not maintain that application of these "normal principles of contract interpretation" commands a result different than that reached by the two lower courts.

In fact, the government's position is quite to the contrary: It insists that it is entitled to special rules when contracting. But its plea conflicts with this Court's recognition that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607 (2000) (quoting *Winstar*, 518 U.S. at 895). The courts below did not err by refusing to create a special rule for the government. Rather, they faithfully applied *Winstar* in examining the "the realities of the transaction," 518 U.S. at 863, and concluding that the documentary record evidenced the government's intent to be bound. The government has put forth no persuasive reason for this Court to revisit that case-specific determination.[6]

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6 Unlike the government's conditional cross-petition, CalFed's petition (in No. 01-592) presents substantial questions regarding the appropriate remedies for the government's breach of *Winstar*-type contracts—questions that may affect more than 100 pending cases and warrant this Court's review as a consequence of the court of appeals' failure to

CONCLUSION

The conditional cross-petition petition for a writ of certiorari should be denied.

Respectfully submitted.

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adhere to well-established *legal* principles governing contract remedies. The government asserts, however, that "[i]f this Court decides to address the damages issues raised by [CalFed], it should not do so without considering the antecedent liability issue raised herein." Pet. 15. Contrary to the government's suggestion, resolution of those remedial issues would in no way be advanced by a predicate determination that the government had in fact entered into goodwill contracts with CalFed. The government has *conceded* that a contract was formed in the Southeast transaction, and thus the remedial issues would remain open even if this Court were somehow to reverse the liability determinations as to the Brentwood and Family transactions. Thus, if the Court grants CalFed's petition (as we respectfully submit it should), it should deny the government's conditional cross-petition because, as in *Winstar*, there is no reason for the Court to revisit determinations as to contractual intent in which both lower courts concurred, and that, in any event, are correct.

Supreme Court, U.S.
FILED
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No. 01-698

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CALIFORNIA FEDERAL BANK, FSB

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE CROSS-PETITIONER

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REPLY BRIEF FOR THE CROSS-PETITIONER

As the cross-petition explains, the Federal Circuit in this case substantially departed from settled principles of administrative law and the law of contracts by construing exchanges of documents that reflected nothing more than the application for—and grant of—necessary regulatory approval for two private transactions as having created express contracts between the regulatory agency and the regulated entity. A change in regulatory policy, even one that affects the expectations of regulated entities, is ordinarily viewed not as a breach of contract, but rather is analyzed under the standards applicable under the Administrative Procedure Act. Those standards grant an agency "ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances,'" *Rust* v. *Sullivan*, 500 U.S. 173, 187 (1991), and, when that latitude is exceeded, authorize correction of the error and pre-

clude any award of damages, see 5 U.S.C. 702; cf. 28 U.S.C. 2680(a). By converting agency regulatory approval of a private transaction into a contract between the agency and the private entity, without any resulting agreement in the nature of a contract (or, indeed, any manifestation of an intent to contract), the court of appeals converted the change in regulatory policy into a breach of contract and substituted the unauthorized remedy of damages for the remedial scheme put into place by the APA. That holding is likely to have its most direct impact on the numerous *Winstar*-related cases pending in the Court of Federal Claims and the Federal Circuit, see *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), but the precedent it sets could pose difficulties for a wide variety of other agency actions as well. Accordingly, if the Court determines that interlocutory review of this case is appropriate at all, then it should grant such review to address the important antecedent issue of liability presented in the cross-petition.[1]

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[1] CalFed asserts (Br. in Opp. 17 n.5) that our decision to file only a conditional cross-petition for certiorari "undercut[s]" our "ostensible concern" with the court of appeals' decision in this case. To the contrary, the court's resolution of the liability question is an erroneous resolution of a fundamentally important issue. Nevertheless, as explained in the cross-petition (at 14) and in our brief in opposition to CalFed's petition (at 11-14), piecemeal review in this case is unwarranted. The Court will be in the best position to consider any issues on which the government or CalFed might seek review upon the conclusion of the lower court proceedings, thus avoiding piecemeal (and possibly unnecessary) review at this time. But if the Court concludes that review is warranted at this stage, the Court should resolve the antecedent question of liability presented in the cross-petition, which has significance not only in this case but also in many other *Winstar*-related cases pending in the courts below.

I. THE CROSS-PETITION PRESENTS A LEGAL, NOT A FACTUAL, QUESTION

CalFed mistakenly contends that "[t]he government does not argue that the courts below applied an improper legal standard," Br. in Opp. 10, and that the lower courts simply made "factual findings," *id.* at 12, for which further review is unwarranted. In the first place, the liability issues in this case (unlike the issues concerning remedy presented by CalFed in its petition for certiorari) were decided on summary judgment, as a matter of law. Accordingly, this is not a case in which a court has interpreted ambiguous evidence and the government "interprets the evidence differently." *Ibid.* Instead, it is a case in which there were no "factual findings" made by either lower court precisely because they disposed of the case by relying on a mistaken legal standard.

More fundamentally, the cross-petition seeks review of just that improper legal standard. The cross-petition explains that "[t]he courts below effectively converted a regulatory record into a binding contract," Cross-Pet. 16, and that "[a] court cannot properly find the existence of a contract * * * between the United States and a private party based on the issuance of documents by a federal agency that constitute regulatory approval of a private transaction," *id.* at 22. The "improper legal standard" is the court of appeals' position that a request for and grant of regulatory approval for a private transaction constitutes a contract between the regulatory agency and the regulated entity, even without any "manifestation of an intent to enter into a contract embodied in documents or conduct aside from the documents that record the agency's approval and the mere give-and-take of the regulatory process," *id.* at 23; see

also *ibid.* ("In a situation in which regulatory approval is required for a private entity to engage in a transaction, a determination by a court that the government has entered into a contract must be based on something more than a record of regulatory approval."). That legal standard "would not only violate ordinary principles of contract formation and administrative law," *id.* at 22, but would also violate the prohibition under the Tucker Act against recognizing contracts implied in law, *id.* at 24; see also *ibid.* (court of appeals' holding "conflicts with long-standing principles of administrative law").[2]

CalFed's reliance on the "two-court rule," see Br. in Opp. 12-13, is mistaken for the same reasons. Under that rule, this Court generally limits its reconsideration of *factual* determinations when a district court and court of appeals take the same view of disputed facts. Thus, in each of the cases cited by CalFed (see Br. in Opp. 12), the rule was invoked after a district court had reached a judgment on certain facts after full litigation of those facts. See, *e.g.*, *Berenyi* v. *District Dir.*, 385 U.S. 630, 634-636 (1967) (factual determination after extensive and conflicting testimony regarding whether

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[2] CalFed contends (Br. in Opp. 11) that "[w]hile this Court [in *Winstar*] granted the government's petition to consider (and, ultimately, reject) the availability of certain defenses asserted by the government, the Court left undisturbed the lower courts' determinations that the goodwill contracts at issue had been formed." The petition for a writ of certiorari in *Winstar* did not challenge (and the instant cross-petition does not challenge) the ruling that contracts had been formed in *Winstar*. The fact that this Court left that undoubtedly correct ruling "undisturbed" in *Winstar* has nothing to do with the question whether review is warranted on the question whether contracts were formed in this case.

petitioner had been a member of the Communist Party); *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 274-275 (1949) (facts about whether there has been patentable invention based on three-week trial). The two-court rule does not limit Supreme Court review in cases like this, in which two courts have mistakenly applied the law in granting summary judgment based on a set of uncontested facts; such cases may well (and this case does) present legal issues that warrant further review.

II. THE COURT OF APPEALS' DECISION IS NOT SUPPORTED BY THIS COURT'S DECISION IN *WINSTAR*

CalFed argues (Br. in Opp. 14-16) that "[t]he courts below faithfully applied the teaching of *Winstar*" and that "[t]he conclusion of both lower courts that goodwill contracts were formed is plainly correct." *Id.* at 14. In CalFed's view, "[i]n each of the three transactions, CalFed made an offer to contract with the government, promising to acquire one or more failing thrifts in exchange for the right to include supervisory goodwill in calculating its regulatory capital," and "[t]he government accepted each of these offers." *Ibid.*

1. CalFed's statement identifies precisely the error in the court of appeals' decision.[3] A great many federal agency actions could certainly be characterized as the submission by a regulated entity of an "offer" in the

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[3] Our comments throughout this reply brief are limited to the two transactions at issue in the cross-petition. The third transaction to which CalFed repeatedly refers in its brief in opposition —its acquisition of Southeast—is not at issue in the cross-petition. We have never disputed that the Assistance Agreement concerning the Southeast transaction was a contract. See Cross-Pet. 4-6.

form of a request for agency approval to take an action, followed by a regulatory "acceptance" in the form of an expression of approval to take the action, with or without additional conditions. Review of those agency actions, however, occurs under administrative law standards governing judicial review of agency action under the APA, not the law of contracts, and the remedy for any violation in such cases is to set aside the agency action, not to award damages. See Cross-Pet. 24-28. To construe a regulatory approval as a contract "would be to limit drastically the essential powers of a[n] [administrative] body." *National R.R. Passenger Corp.* v. *Atchison, Topeka, & Santa Fe Ry.*, 470 U.S. 451, 466 (1985). See Cross-Pet. 25-26.[4]

The undisputed record in this case is no different from the record of any request by a regulated entity for a regulatory agency to take certain regulatory action and a consequent decision by the agency to take that action. Indeed, what is most striking about this case—and what squarely presents the legal issue in the cross-petition—is the complete absence of any documentation or other contemporaneous evidence that the parties intended to form a contract, rather than seek

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[4] CalFed asserts (Br. in Opp. 18-19) that our reliance on *National Railroad Passenger Corp.* is unavailing in light of the Court's decision in *Winstar*. None of the opinions in *Winstar*, however, questioned the continued authority of *National Railroad Passenger Corp.*, which is directly on point here in explaining the impermissibility of construing a governmental regulatory action as a contractual undertaking. In *Winstar*, the Court did reject our "unmistakability doctrine" argument, see 518 U.S. at 871-888, but that doctrine has to do with contract *interpretation*, not (as in this case) the contract *formation* question of whether a court may construe a regulatory action, unaccompanied by any manifestation of intent to contract, as a contract.

and obtain the necessary regulatory approval for private transactions. For example, the sole documents that CalFed cites as the "offer to contract with the government," Br. in Opp. 14, in connection with its acquisition of Brentwood are an "Application * * * for Merger" submitted by CalFed and a subsequent letter from CalFed to the Bank Board. 3 C.A. App. A5002254-A5002264, A5002329-A5002331. The documents CalFed cites for the Bank Board's "acceptance" of the alleged contract are simply the Bank Board resolution that approves the merger subject to certain conditions, see *id.* at A5002319-A5002321, and an accompanying letter reciting that the Bank Board had "determined to exercise supervisory forbearance, to grant waivers and to confirm the manner of application of certain regulatory requirements," *id.* at A5002322. The documents concerning CalFed's acquisition of Family are similar. Neither the supposed "offer" nor the supposed "acceptance" uses the language of contract; the terms "offer," "acceptance," "contract," "agreement," "consideration," and their derivatives are entirely absent. The court of appeals' error consisted precisely in determining that such documents, which consist only of a request for and the issuance of formal regulatory approval, could, without more, could be construed as a contract.[5]

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[5] CalFed states (Br. in Opp. 4) that it was "induced" to acquire Family and Brentwood by the "government's goodwill promises." The trial court similarly stated sweepingly that it agreed with CalFed's position that government "induce[ment]" based on "promises regarding supervisory goodwill and capital compliance" was "[t]he common operative fact in all *Winstar*-type transactions." 01-592 Pet. App. 86a. Neither CalFed nor the trial court cited any evidence for the proposition that the government had "induced" CalFed to acquire either Brentwood or Family, rather than permitted CalFed to acquire those institutions at its own initiative

CalFed cites (Br. in Opp. 15) one item of nondocumentary noncontemporaneous evidence: a statement in a declaration of a former Bank Board employee, D. James Croft, obtained by CalFed during the litigation, a decade after the events at issue. See 3 C.A. App. A5002914-A5002915. Crucial details of Croft's affidavit were disputed, and they accordingly could not have been (and were not) relied upon by either court below in granting and affirming summary judgment to CalFed on liability. Croft was not, as CalFed states (Br. in Opp. 15), "ultimately responsible for approving all three transactions at issue;" the Bank Board itself had that legal responsibility. Moreover, Croft's declaration stated that he handled "supervision and examination issues" during the period at issue, not regulatory approvals. See 3 C.A. App. A5002909. Most significantly, his apparent statement that the Bank Board believed regulatory forbearances to be the same as contracts was directly contradicted by the declaration of Lawrence Hayes, the FHLBB's former Deputy General Counsel, who actually drafted assistance agreements, resolutions, and forbearance letters. See *id.* at A5001450-A5001451. He explained:

> Forbearances were different in nature from assistance agreements. Assistance agreements were entered into not by the Bank Board, but by FSLIC under its authority to contract for the provision of assistance. Forbearances, on the other hand, were issued by the Bank Board pursuant to a Bank Board

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and for its own business purposes. See Cross-Pet. 18 n.2. The court of appeals accordingly did not cite or rely on any supposed "inducement" as support for its conclusion that contracts had been formed between the regulators and CalFed.

> resolution. Forbearances were regulatory in nature; they were not intended to be contractual.

Id. at 5001451.

CalFed is correct (Br. in Opp. 15) that our position is that separate contractual documents—or at least a manifestation by each party of intent to enter into a contract—is necessary in order for a court to find the existence of a contract that could, in turn, incorporate certain regulatory orders or documents. That, indeed, was the logic of the plurality's opinion in *Winstar*, which began with the contracts between the parties (the Assistance Agreements) and then concluded that the integration clauses of those contracts had given those otherwise non-contractual, regulatory documents (the Bank Board resolutions and forbearance letters) contractual significance. Specifically, the plurality concluded that FSLIC, in entering into the Assistance Agreements, had agreed to assume the risks of a change in the regulatory policy. See Cross-Pet. 20-21 (discussing 518 U.S. at 863, 868-869, 871, 881-883, 888-890, 907-908, 909-910); see also *id.* at 918 (Breyer, J., concurring); *id.* at 919-920, 923 (Scalia, J., concurring in the judgment). Under CalFed's theory, that reasoning would have been entirely unnecessary, because the Bank Board resolutions and letters would have been contractual undertakings in and of themselves, regardless of the Assistance Agreements. Although CalFed is correct (Br. in Opp. 16) that "contracts need not have an integration clause to be binding," a request for regulatory action and consequent decision by the regulator to take that action is not a contract, particularly in the absence of any indication of mutual intent to contract. In this case, the undisputed evidence is that neither party to the supposed "contracts"—neither CalFed nor

the Bank Board—manifested any intent to form a contract.

2. CalFed contends (Br. in Opp. 17) that our "attempt to distinguish between the FHLBB's and FSLIC's 'contractual' undertakings and their 'regulatory' undertakings is nothing less than an attempt to reargue *Winstar*." In *Winstar*, the plurality indeed stated that the two capacities were "fused *in the instances under consideration*." 518 U.S. at 894 (emphasis added). That conclusion makes clear that in other instances *not under consideration* in *Winstar* itself—such as CalFed's acquisitions of Brentwood and Family, in which there was *no* separate agreement of a contractual nature and indeed *no* manifestation whatever of an intent to contract (and in which the parties appear to have taken care precisely to avoid any such manifestation)—the two capacities were *not* so fused. As explained above and in the cross-petition, this Court's decision in *Winstar* was not an open grant to courts of authority to construe agency regulatory actions as contracts, and the plurality's reasoning in *Winstar* conflicts with—rather than supports—the court of appeals' conclusion in this case.

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For the reasons stated above and in the cross-petition, if the Court grants the petition for a writ of certiorari in No. 01-592, it should also grant the cross-petition for a writ of certiorari.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General *

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* The Solicitor General is disqualified in this case.